DRAFT

OGC Has Reviewed

DD/A 78-0170/13

DDA Personnel-11

MEMORANDUM FOR: General Counsel

STATINTL FROM : [redacted]
Assistant General Counsel

SUBJECT : Use of Central Employee Activities Fund (CEAF) for Headquarters Physical Conditioning Facilities

REFERENCES :
A. Memo to DDS fm Acting Comptroller, Subj: Establishment of Central Club Fund to receive proceeds from Closed Clubs, Messes and other facilities, dtd 21 Nov 60.

B. OGC 60-1381, dtd 24 Oct 60.

C. OGC 61-1373, dtd 4 Oct 61.

1. In connection with an OGC re-examination of the funding for various phases of the program to improve the Headquarters physical conditioning facilities, a question has arisen concerning the legality of using the CEAF particularly with reference to building tennis courts. Following is a discussion of the status of this fund and an opinion concerning the legality of its existence and utilization.

2. I have concluded that it may be possible to use non-Governmental funds donated to a non-Governmental organization for construction of physical conditioning facilities on the Headquarters compound if such an organization can be granted a license to use Federal property for that purpose. Further, I have concluded that CEAF monies are non-Governmental funds and their use would not violate the proscription against augmenting appropriations. I have also concluded, however, that existing Agency regulations governing use of these

STATINTL funds [redacted] may prohibit their use as contemplated.

LICENSE TO USE FEDERAL PROPERTY

3. Generallly, the DCI, as head of the Agency, and GSA have authority to determine the utilization of property under their control. Thus, the Director may elect to grant a revocable license to use a portion of the compound area to a non-Governmental recreational association (or perhaps EAA) for the construction of physical conditioning facilities. This revocable license agreement would permit only limited improvement in the property and provide that all such improvements would, upon termination of the license, become the property of the United States. The license would provide that the physical conditioning facilities would be available to all employees of the Agency, and not restricted to members of any particular organization.

4. The crucial question which must be answered prior to implementation of this proposal is who has control over granting licenses for use of the grounds[1] surrounding the Agency building. The answer to this question is not altogether clear. Under the Federal Property Management Regulations, 41 CFR 101-17, such authority apparently rests in the General Services Administration. Historically, however, the Director has exercised substantial control over the utilization of Agency buildings and grounds by virtue of the unique security considerations which exist for our organization. Notwithstanding the conclusion of which agency head may have the actual authority, it would appear appropriate to seek the approval and coordination of GSA in any event. If such concurrence is obtained and if the problem concerning our internal restrictions on the use of CEAF monies in HR [redacted] can be resolved, action may then be initiated to establish a central employees recreational organization capable of receiving the CEAF monies or initiate discussions with an existing organization, such as EAA, for the same purpose.

STATINTL

THE NATURE OF CEAF

5. The CEAF is, in actuality, a Government account into which monies are deposited and withdrawn (see paragraph 5 of reference A). It has no members, officers, charters, or bylaws or any status as either an incorporated or an unincorporated entity. On 24 October 1960, this Office issued an opinion (reference B) which stated that we perceived no legal objection to the establishment of the CEAF.

1/ 101-17.003-4 defines Government owned space as "space in buildings, or land incidental thereto, the title to which is vested...pursuant to existing agreement in the United States Government." (Emphasis added.)

No statutory basis for establishing the fund was advanced, nor was any identified by this Office (The Department of State since 1963 has had such statutory authority, 22 U.S.C. 1138, and has promulgated appropriate implementing regulations, one of which established a Central Commissary, Mess, and Recreational Fund [see tab 1].). In reference C this Office concurred in the revision of STATINTL incorporating language concerning the CEAF.

SOURCE OF FUNDS

6. The CEAF was established and continues to be augmented by the net profits of existing self-sustaining, personnel service or recreational activities and the net proceeds from such activities when terminated. STATINTL states, in pertinent part:

> (3) Amounts of accrued profits of self-sustaining activities reported in the annual fiscal year report that are determined by the Deputy Director for Administration as being excess to their current or foreseeable future needs will be transferred to the Director of Finance for deposit in the Central Employees Activities Fund.
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> (4) Assets of any terminated self-sustaining activity will not be distributed to members. Net cash resulting from liquidation of any such activity will be transferred to the Director of Finance for deposit in the Central Employees Activities Fund.

The net profits or net proceeds after termination of Agency-operated[2] personnel service or recreational activities (as opposed to self-sustaining activities) are not deposited into the CEAF but, in accordance with STATINTL are transferred to the Director of Finance for deposit in miscellaneous receipts. The different treatment between self-sustaining and Agency-operated activities is undoubtedly based on the assumption that self-sustaining activities have repaid the Agency for all expenses incurred by the Agency as a result of the establishment or operation of its activities. The converse is true with respect to Agency-operated activities. Here the United States Government should properly receive whatever excess monies remain after the termination of the activity in order to recoup some of the expenses incurred in its establishment and operation. According to the Office of Finance, the CEAF has approximately $100,000 in

2/ These activities are similar to the Department of State's emergency commissary, or mess services authorized by 22 U.S.C. 138(a).

current assets; some of which has been trasferred, "in trust," to EAA in order to enable the money to be converted into certificates of deposit earning interest rather then being held in a non-interest bearing Agency account. The interest is redeposited in the CEAF.

CHARACTERIZATION OF CEAF MONIES

7. The characterization of the CEAF funds depends upon the status of personnel service and recreational activities. If personnel service and recreational activities are, in reality, merely extensions of the Agency, such funds must then be considered a "collection"[3] which, upon acceptance by the Agency, become public monies. If these activities can be considered non-appropriated fund activities, the monies from such activities are not the property of the United States Government and should not be considered public monies. Kenny v. U.S., 62 Ct. Cl. 328 (1926), 43 Comp. Gen. 341 (1963).

STATUS OF AGENCY-OPERATED AND SELF-SUSTAINING PERSONNEL SERVICE AND RECREATIONAL ACTIVITIES

STATINTL 8. [redacted] sets forth Agency policy and general responsibilities relating to the establishment, operation, and termination of personnel service and recreational activities. It provides that the chiefs of field installations, the Director of Finance, and the Deputy Director for Administration will supervise the activities within their particular fields of expertise.

STATINTL 9. [redacted] provides that:

> The Deputy Director for Administration will approve or disapprove recommendations for the creation of new activities, the expansion of existing facilities, the advancing of Agency funds for new or expanded activities, the transfer of a portion of excess accrued profits to the Central Employees Activities Fund, and the use of the moneys in this fund. (Emphasis added.)

One of the few authorities which appeared to be lacking is the specific authority to terminate a personnel service or recreational activity. Arguably, that authority is an inherent component of the rights perviously enumerated.

10. In OGC 76-1800, dated 8 March 1976 (tab 2), this Office had the occasion to examine the status of such activities. The case involved the authority to transfer Government property to personnel service and recreational activities for use by association members. After an examination of the degree of control

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3/ As the term is used in Title 7, Fiscal Procedures, GAO Policy and Procedures Manual for Guidance of Federal Agencies.

and supervision exercised by the Agency, we determined that the club in question could be considered an Agency activity thereby entitling it to receive Government property. While day-to-day Government supervision of the club is lacking, Agency control was still pervasive, especially with respect to financial matters.

11. Notwithstanding Agency control over club activities described above, each of these particular club activities is an identifiable entity. While the form of each activity may vary somewhat, they are normally organized under a charter/bylaw system which charges dues to offset operating costs incurred by the club. The day-to-day supervision and management of the activity is carried on by managers or officers selected by club members to perform such functions. Decisions regarding the particular activities of the club, such as the hiring of employees and the expenditure of funds, are carried out by the club entity. In addition, it is clear to the undersigned that employees who participate in such organizations do so on the belief that membership dues are retained by the club organization (or some central fund) and remain available for use by their club or similar club activities. After balancing these factors, I believe it is possible to conclude that self-sustaining personnel service and recreational activities are non-Governmental activities.

DISPOSITION OF MONIES RECEIVED FROM SELF-SUSTAINING PERSONNEL SERVICE AND RECREATIONAL ACTIVITIES

12. Section 484 of Title 31 of the United States Code provides that:

> The gross amounts of all moneys received from whatever source for the use of the United States--- shall be paid by the officer or agent receiving the same into the treasury, as early a day as possible, without any abatement or deduction. . . . (Emphasis added.)

Officers or agents who neglect or refuse to comply with the provisions of this section, are subject to removal from office and to forfeit to the United States any share or part of the monies withheld to which they might otherwise be entitled (31 U.S.C. § 490). The dictates of Congress concerning the deposit of public monies is further emphasized in section 495 of Title 31 of the United States Code and provides that:

> Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditures, shall pay the same to the Treasurer or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. . . .

Paragraph 12.2 of Title 7 of the General Accounting Office Manual for Guidance to Federal Agencies provides that:

> All collections received by agencies and accountable officers shall, insofar as possible, be deposited daily with an authorized depositary....

13. It is clear from the cited authorities that all monies received from whatever source for use of the United States must be deposited into miscellaneous receipts. The present issue is whether the receipts from non-Governmental personnel service and recreational activities presently deposited in the Agency's CEAF account constitute monies received for the use of the United States. As presently configured, the CEAF is controlled by the United States Government by virtue of the DDA's control over the maintenance and disposition of the funds. While such a situation may not be legally improper, we believe it to be unwise, since it supports the argument that the monies are received for use by the United States as opposed to being received by a non-Governmental central club fund.4/

14. Secondly, history suggests that neither the Agency nor employee association members contemplated that excess funds would become public monies and be deposited in the U.S. Treasury. Rather, it seems clear that dues and profits were paid by individual employee association members for use by their activity or similar successor organizations. It was recognized that self-sustaining personnel service and recreational activities would be required to repay any Government loans (seed money) provided to assist in the initial operation of the activity. Thereafter all funds would be plowed back into the club organization or, if excess profits accrued or the club was terminated, deposited to the Central Fund for utilization by other similar activities. The Office of Finance has advised that there are no outstanding Agency loans to self-sustaining personnel service and recreational associations which must be satisfied from CEAF funds.

15. Considering all of these facts, plus the current practice of the Department of States' CCMRF (see tab 3), it is my view that the CEAF may be accurately described as receipts from non-Governmental activities which were transferred to the DDA (as custodian) for use by other non-Governmental activities and not for the use of the United States Government. This Office would recommend, however, that the DDA transfer the authority to control the CEAF monies to a board (similar to that created by the Department of State) for the reason discussed in paragraph 10.

4/ We have concluded that as presently drafted, the regulation cannot be fairly read to mean that the DDA is acting in the private capacity when he renders decisions concerning the maintenance, utilization and disposition of CEAF funds. At the very least he is acting as an "official" custodian.

RESTRICTION ON THE USE OF CEAF MONIES - PROHIBITION AGAINST AUGMENTATION

STATINTL

16. [redacted] provides that the funds may be used for the general benefit and morale of Agency personnel such as recreational activities, establishment of new self-sustaining activities, or providing financial relief to existing self-sustaining activities. The authorities cited in paragraph 9, however, clearly manifest Congressional intent that Government agencies conduct their activities only with those funds specifically appropriated by Congress for that purpose. Title 31 U.S.C. 628 further restricts use of funds so appropriated to the objects for which they are made.5/ While the Comptroller General has ruled that expenses which are necessary or incident to the execution of the stated object of the appropriation are proper, such discretion may not go beyond the statute, nor be exercised in conflict with law, nor for accomplishment of purposes unauthorized by the appropriation. 18 Comp. Gen. 285 (1938). It is a well established rule that appropriated funds may not be augmented from another appropriation or other sources unless specifically authorized by law. 26 Comp. Gen. 545 (1947); 2 Comp. Gen. 775 (1923). This rule has been held to apply to even the acceptance of a gift by a Government agency. In 36 Comp. Gen. 268, 269 (1956) the Comptroller General stated:

> It is well established that in the absence of specific legislation therefore there is no authority for an official of the Government to accept on behalf of the United States voluntary donations or contributions of cash to augment appropriations made by the Congress for particular purposes.

17. Congress has, on occasion, given specific agencies statutory authority to accept gifts. Most pertinent for our purpose is 40 U.S.C. 298a which provides:

> The Administrator of General Services, together with the Postmaster General where his office is concerned, is authorized to accept on behalf of the United States unconditional gifts of real, personal, or other property in aid of any project or function within their respective jurisdictions. (Emphasis added.)

Similar authority has, however, not been given to the Agency. In the absence of such authority gifts of property or monies must be turned over to the proper Government agency (GSA or Department of the Treasury) for disposition. Accordingly, it is our view that any CEAF monies donated to the Agency for whatever purpose must be transferred to miscellaneous receipts.

5/ 31 U.S.C. 628 states: "Except as otherwise provided by law, sums appropriated for the various branches of expenditures in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

RESTRICTIONS ON THE USE OF CEAF MONIES - AGENCY REGULATIONS

18. In addition to the restrictions imposed by Title 31 discussed above, one must consider the impact of [redacted] provides that:

> ...subject to the approval of the Deputy Director for Administration, these funds are used for the general benefit and morale of Agency personnel, such as recreational activities, establishment of new self-sustaining activities, or providing financial relief to existing self-sustaining activities.

This language does not restrict the use of CEAF monies to recreational activities aboard, or conversely, prohibit their use at the Headquarters area or any other domestic Agency post. The entire [redacted] regulation, however, is concerned with the creation and assistance of personnel service or recreational activities at field installations when justified by factors peculiar to the mission of the Agency. [redacted] defines factors peculiar to the mission of the Agency as:

> Isolated location of the installation, limited number of Agency personnel at the installation, lack of transportation to commissary or recreational areas, nonavailability of recreational facilities sponsored by the cover activity, security considerations prohibiting attendance at or participation in public recreational activities; etc....

Considering the placement of the Central Employee Activities Fund in this regulation, one might fairly conclude that this restriction applies to the utilization of the CEAF monies. Such a conclusion is supported by the fact that the assets of the CEAF were accumulated from monies derived from overseas personnel service and recreational activities. While the Headquarters compound technically falls within the definition of a field installation in [redacted] the undersigned has difficulty accepting the proposition that the construction or improvement of physical conditioning facilities at Headquarters could be justified because of factors peculiar to the mission of the Agency. Unless changed, this regulation would, in my view, impose an insurmountable barrier to utilization of the funds as contemplated.

CONCLUSION

19. In summary, it is the opinion of the undersigned that CEAF monies may be considered to be non-Governmental funds. Secondly, CEAF monies, if donated directly to the Agency, may not be used for constructing physical

[redacted]

conditioning facilities, but must be forwarded to the U.S. Treasury for deposit into miscellaneous receipts. Thirdly, the use of CEAF monies to construct physical conditioning facilities at the Headquarters compound would violate the present restrictions in STATINTL Finally, I have concluded that the DCI, in coordination with GSA, may grant to a non-Governmental organization a license to use land on the Headquarters compound for physical conditioning facilities. The CEAF (preferably a non-Governmental board rather then the DDA) may then wish to donate certain sums to such an organization (or establish their own association) to construct physical conditioning facilities (assuming the STATINTL restriction is eliminated).

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